In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 379

STEWART M. ALEXANDER, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the Middle District of North Carolina (R. 16-45) is reported at 134 F. Supp. 691. The opinion of the United States Court of Appeals for the Fourth Circuit (Pet. App. 16-25) is reported at 234 F. 2d 861.

JURISDICTION

The judgment of the Court of Appeals was entered on June 5, 1956 (Pet. App. 16). The petition for a writ of certiorari was filed on September 4, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Court of Appeals erred in concluding, on the particular facts of this case, that, as a matter of Indiana law, an Air Force Pilot acted beyond the scope of his authority in transporting petitioner in a Government aircraft, when petitioner's presence on the aircraft violated applicable Government regulations and the sole purpose of the flight was to serve petitioner's private convenience.

STATUTES INVOLVED

The relevant provisions of the Federal Tort Claims Act (28 U.S.C. 1346, 2671, 2674) and of the Indiana statutes (Burns Indiana Statutes 14-106, 47-1021) are set forth in petitioner's appendix at pp. 27-28.

STATEMENT

This action was brought in the United States District Court for the Middle District of North Carolina against the United States under the Federal Tort Claims Act, and against the Civil Air Patrol (CAP),[1] a federally chartered corporation (R. 1-4),[2] for injuries received in the crash of an Air Force aircraft in which petitioner was riding as a passenger (R. 45). The facts found by the District Court, which are largely undisputed, can be summarized as follows:

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[1] The Civil Air Patrol is a private, federally-incorporated organization which, *inter alia*, serves as a "volunteer civilian auxiliary of the United States Air Force" (5 U.S.C. 626 1).

The National Commander of the CAP is an Air Force general officer who serves in a dual capacity as head of the CAP and as Commanding General, Headquarters and Headquarters Squadron, CAP, USAF (R. 9, 10).

[2] References are to the record appendix to appellant's brief, nine copies of which have been filed by petitioner herein pursuant to this Court's Rule 21(4).

In September 1950, petitioner, a professional golfer, was scheduled to play in a golf tournament to be held at Kansas City, Kansas (R. 32). Following the tournament, he planned to go from Kansas City to his home in Lexington, North Carolina in order to visit his family before leaving on a South American golf exhibition tour (R. 27). On arriving in Kansas City, however, petitioner discovered that he could not obtain airline transportation which would enable him to return home and still leave on schedule for the South American tour (R. 27).

While the tournament was in progress, representatives of the Civil Air Patrol were attempting to win the support of members of the Professional Golfers Association in order to secure the services of nationally known golf professionals on a non-compensatory basis in golf exhibition matches which would publicize and raise funds for the CAP (R. 32, 33). The CAP promotion plan, which was then in a highly tentative stage (R. 67, 69), had received the approval of Major General Lucius V. Beau, USAF, the National Commander of the CAP, and Commanding General, Headquarters and Headquarters Squadron, USAF (R. 26, 27). The plan contemplated that well-known golf professionals *who agreed to join the CAP* would be flown in CAP aircraft at the end of a tournament in which they were contestants to another locality where they would play in an exhibition match for the CAP's benefit, and then be flown by the CAP to the site of their next scheduled tournament (R. 32). Although petitioner was not a member of the PGA Tournament Committee conferring with the CAP officials nor a CAP member (R. 77), the CAP officials learned of his transportation diffi-

culty. They offered to procure a ride for him in a CAP aircraft, apparently for the sole purpose of gaining his good will (R. 33, 34). Petitioner accepted this offer.[3]

The CAP officers were unsuccessful in several attempts to locate an aircraft (R. 27). Finally, on September 22, 1950, the CAP officials were able to persuade an Air Force First Lieutenant, Oliver A. Singleton, who was serving as liaison officer to the South Dakota Wing of the Civil Air Patrol, to make use of a twin engine aircraft (assigned to him for his personal use in carrying out his duties as Liaison Officer) to transport petitioner from the Olathe, Kansas airport to Louisville, Kentucky, where he could obtain airline transportation to his home in Lexington, North Carolina (R. 33).

On September 24th, at 5:40 P.M., Singleton, two of the CAP officials, and petitioner took off at Olathe, Kansas, bound for Louisville (R. 39). As the sole purpose of the flight was to carry petitioner to Louisville (R. 34), the two CAP officers presumably were riding for their own pleasure.

The flight proceeded without incident until 7:58 P.M. when the pilot reported by radio to the control tower of the Evansville, Indiana Municipal Airport (R. 69). Shortly thereafter, a warning light flashed, indicating that the fuel in one of the aircraft's tanks was almost

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[3] Petitioner testified that he had no agreement or understanding with the CAP or its officers that he would participate in the CAP golf promotional plan (R. 64, 69, 74, 75, 77); that the plan was highly tentative at the time (R. 64); that he had told the CAP officials his participation in the plan was uncertain (R. 69); and that the negotiations conducted by the PGA's Tournament Committee could not have reached an agreement since the Tournament Committee had no authority to bind the PGA (R. 75). Lloyd Mangrum, a PGA member and disinterested witness, confirmed these statements (R. 78).

consumed (R. 70). When the pilot attempted to change from the empty to a full tank, a pin securing the tank selector switch handle to the fuel valve sheared, making it impossible to switch tanks. Almost immediately, both engines stopped for lack of fuel. The aircraft was sighted by the Evansville Airport tower at 8:02 P.M., at an altitude of between 3,500-4,000 feet, approximately three miles to the northwest and headed towards the tower in a southeasterly direction. (R. 54).

The pilot asked for emergency landing instructions and was advised to land on runway three, located in a northeasterly-southeasterly direction, the longest and least obstructed runway (R. 56). By approximately 8:04 P.M., the plane had reached a point three-quarters of a mile west-northwest of the tower at an altitude of 2,000 feet (R. 40, 54). The plane was observed at this point to make a relatively shallow turn to the right in a direction parallel to runway three, heading downwind (southwesterly) towards the approach end of that runway, away from the tower and the center of the airport (R. 40, 71).

The following events occurred during the next sixty seconds (8:04-8:05 P.M.). The pilot said "We are at 2,000 on downwind for 3, gear down and in the green" (R. 56).[4] The tower told the pilot that he was cleared to land. The plane continued on its course parallel to the runway for some seconds, then was seen to make a sharp turn left, and almost immediately a second sharp left turn, bringing it in line with the final approach to runway three (R. 73). The plane then struck the ground, bounced, and burst in flames approximately 1,800 feet short of the beginning of runway three (R.

[4] "In the green," *i.e.*, landing gear down and locked in place.

41). When the aircraft caught fire on coming to rest on railroad tracks near the southwest boundary of the airport, petitioner escaped by kicking open a door in the rear of the fuselage. The Air Force pilot and the two CAP officers were killed.

After a lengthy trial, the District Court dismissed the complaint against the CAP, and awarded $75,000 to petitioner for injury, loss of earnings, and other damages. The court held (1) that petitioner was an authorized passenger under Air Force regulations (without, however, identifying the particular regulation on which it relied) (R. 35, 44); (2) that General Beau and the CAP officials had authority to authorize the flight (R. 39); (3) that General Beau ratified the flight (R. 37); (4) that the CAP officials and the Air Force pilot had apparent authority to invite petitioner to ride on an Air Force plane (R. 35, 39); (5) that the pilot was therefore acting within the scope of his authority, and owed petitioner a duty of reasonable care (R. 38).

The District Court also found that the pilot was negligent in operating the aircraft (R. 40, 41); that the United States by its servants was negligent in maintaining the fuel switch (R. 41, 43); and that these acts or omissions were the proximate cause of petitioner's injuries (R. 43, 44).

The Court of Appeals reversed, holding that undisputed facts demonstrated "not only that the presence of [petitioner] in the plane as a passenger was unauthorized but, also, that the flight itself, undertaken solely to serve [petitioner's] convenience was unauthorized." (Pet. App. 16-25). Looking to the law of the State of Indiana where the pilot's negligence

occurred, the court held that there could be no liability on the part of the United States under the Tort Claims Act for injuries incurred on a flight which violated Government regulations and was unlawful from its inception.

ARGUMENT

Petitioner (Pet. 2, 5) concedes that the "sole purpose" of the flight was to furnish him transportation to meet his private need, and that his presence on the aircraft violated Air Force regulations.[5] Despite this concession, which leaves no doubt that Lt. Singleton's use of a Government owned aircraft to serve petitioner's private convenience was unlawful from its inception, petitioner contends (Pet. 8-10) that the court below misapplied this Court's decision in *Williams* v. *United States*, 350 U.S. 857, and misconstrued Indiana law in holding, on these admitted facts, that the pilot exceeded the "scope of his authority" in making the illegal flight. But, far from departing from the *Williams* case, the Court of Appeals adhered strictly to that decision in looking to the law of Indiana to determine whether or not a private employer in that State would be liable in like circumstances. Moreover, the court's construction of Indiana law is fully supported by that state's decisions. It is also plain that the deci-

[5] Detailed Air Force regulations in effect at that time governed the use which Singleton could make of the aircraft assigned to him, and the persons who could be carried in it. These regulations provided, *inter alia*, that the senior CAP officials could be carried in USAF-CAP liaison aircraft on official CAP business, but that carriage of persons other than those specifically referred to in the regulations was unlawful, and subject to the penalties of 5 U.S.C. 78 (see Pet. App. 20-22). Petitioner was an unauthorized passenger under these regulations and employment of the aircraft to serve his personal convenience was, of course, not contemplated by the regulations (see R. 62, and 15 Fed. Reg. 484).

sion below does not conflict with *Union Trust Co.* v. *United States,* 221 F. 2d 62 (C.A.D.C.), certiorari denied, 350 U.S. 911. Review by this Court, accordingly, is unwarranted.

1. In *Williams* v. *United States,* 350 U.S. 857, the Court held that the Government's tort liability on *respondeat superior* principles is governed by state law, and hence that the Government's liability for the acts of its employees is that of a private employer in the same state "under like circumstances" (28 U.S.C. 2674).

Expressly recognizing and adhering to this rule (Pet. App. 23), the Fourth Circuit looked to the law of Indiana, the place both of the accident and the pilot's negligence, in order to determine whether a private employer would be held liable in that State in the same circumstances. On the basis of *Dempsey* v. *Test,* 98 Ind. App. 533, and other Indiana decisions cited in its opinion (Pet. App. 23, 24), the Court of Appeals concluded that an Indiana employer would not be liable to a person injured while riding in a company vehicle in violation of company regulations, *even though that vehicle was then being employed on the employer's business.* The court below held, therefore, that the pilot would have exceeded the scope of his authority under Indiana law in offering petitioner an unauthorized ride in a Government aircraft, even if the flight otherwise was for an official purpose. Since the court below found that the flight itself was for a non-governmental purpose, it held, *a fortiori,* that the pilot exceeded his authority under Indiana law (Pet. App. 23, 24).[6]

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[6] In *Dempsey* v. *Test supra,* the vehicle driver had been engaged on his employer's business when he picked up the unauthorized passenger (Pet. App. 23).

Manifestly, therefore, the Fourth Circuit recognized and applied the *Williams* holding that the Government's tort liability on *respondeat superior* principles is based on state law.

2. Petitioner (Pet. 10, 11), however, contends in this Court, for the first time, that the decision below conflicts with *Union Trust Co.* v. *United States,* 221 F. 2d 62 (C.A. D.C.), certiorari denied, 350 U.S. 911, because it fails to apply to the facts of the accident "the law of the place where the act or omission occurred," as required by the Tort Claims Act. 28 U.S.C. 1346.

In seeking to ascertain and apply state law, the court below was confronted at the threshold with the fact that the complaint alleged not only negligence by the pilot in Indiana, but also negligence in maintaining the aircraft (now stated by petitioner to have occurred in South Dakota where the plane was based).[7] Since the case was tried to the District Court entirely on the theory that Indiana law applied (R. 16-32), and petitioner, as well as the Government, took this position in the Court of Appeals, the court below was fully justified in turning to the place where the pilot's negligent act allegedly took place (which was also the place of the accident) in order to ascertain the Government's liability.[8]

Apart from the fact that the argument that the Court

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[7] The district court relied on the doctrine of *res ipsa loquitur* in holding that the aircraft had been negligently maintained, and did not pinpoint the location or character of the negligent act or acts (R. 41). Attachment E to the Air Force Accident Report, which was introduced in evidence by stipulation (R. 46), indicates that although the aircraft received routine maintenance in South Dakota, its major overhauls had been carried out at Minneapolis, Minnesota.

[8] The heading of the second section of the brief filed by petitioner in the Court of Appeals stated (p. 6): "The Doctrine of Respondeat Superior That Would Be Applied Under the Law of Indiana Controls This Case".

of Appeals should have applied the law of another state comes too late, the question appears to be academic, since South Dakota follows the rule adopted by *Dempsey* v. *Test* (*Antonen* v. *Swanson,* 74 S.D. 1, 48 N.W. 2d 161). Indeed, the *Dempsey* rule, as petitioner recognizes (Pet. 8), is the "almost universally accepted doctrine" in this country.

3. Petitioner's remaining arguments are concerned only with the interpretation of state law by the court below and require little discussion. Petitioner (Pet. 13, 14) argues that the Court of Appeals erred in holding that an Indiana employer would not have been liable under the law of that State in the circumstances of this case. However, we have already noted that Indiana, like practically all jurisdictions in this country (Pet. 24), holds that an employee acts beyond the scope of his authority in giving a ride to an unauthorized passenger *even though the employee is operating the vehicle on his employer's business when the injury occurs.* Not only was petitioner an unauthorized passenger, but, as the court below held (Pet. App. 24), the flight—which served only petitioner's personal convenience, and was of dubious or uncertain benefit even to the CAP, a private organization (Pet. App. 17, 18, 22)—was for a non-governmental purpose and therefore unlawful from its inception. *A fortiori,* therefore, the flight was beyond the scope of the pilot's authority under decisions such as *Dempsey* v. *Test, supra; King* v. *United States,* 178 F. 2d 320 (C.A. 5), certiorari denied, 339 U.S. 964; *Alexander* v. *United States,* 98 F. Supp. 453 (E.D.S.C.); and *Parrish* v. *United States,* 95 F. Supp. 80 (M.D. Ga.).[9]

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[9] Petitioner (Pet. 14) argues that the Court of Appeals should have given weight to the fact that the pilot, subsequent to the

Petitioner (Pet. 11-13) also contends that the court below misconstrued Indiana law in holding, alternatively, that the Indiana guest statute barred recovery. Indiana has enacted the conventional automobile guest statute permitting gratuitous passengers to recover against their hosts only for "wanton and willful misconduct" (Pet. App. 24). This statute has been applied by the Indiana appellate court to passengers in petitioner's circumstances. See *Albert McGann Securities Co.* v. *Coen*, 114 Ind. App. 60 (Pet. App. 25). Indiana has also enacted Section 6 of the Uniform Aeronautics Act (Pet. App. 24) which provides that aircraft owners' liability for accidents causing personal injury or other damage to aircraft passengers is governed by "the rules of law applicable to torts on land". Since petitioner has cited no authority, either here or below, establishing that a guest statute is not a "rule of law applicable to torts on land," the Court of Appeals was undoubtedly justified in holding that in no event could petitioner have recovered under Indiana law for injuries received while travelling as a gratuitous passenger on a Government aircraft.[10]

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accident, was found to have been in a duty status for purposes of authorizing payment of death benefits to his family. As the Court of Appeals pointed out, however, this did not have the effect of annulling the applicable regulations (Pet. 22). In any case, there should be and is a fundamental difference in the meaning of the term "line of duty" as used in the Tort Claims Act and its use with regard to military pay and compensation. See *Williams* v. *United States*, 350 U.S. 857, and *United States* v. *Eleazer*, 177 F. 2d 914, 918 (C.A. 4), certiorari denied, 339 U.S. 903.

[10] There was of course no allegation of wanton or willful misconduct on the part of the Government's pilot.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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OCTOBER, 1956.

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